

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>C. KEY CHEVROLET, INC.</b>	:	DETERMINATION
<b>AND C. WAYNE CLARK</b>	:	DTA NO. 818332
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 1999 through May 31, 1999.	:	

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Petitioners, C. Key Chevrolet, Inc. and C. Wayne Clark, P.O. Box 330 - Route 9, Keeseville, New York 12944, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1999 through May 31, 1999.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on November 13, 2001 at 10:00 A.M., with all briefs to be submitted by April 24, 2002, which date began the six-month period for the issuance of this determination. Petitioners appeared by Philip J. Vecchio, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

***ISSUES***

- I. Whether the purchase of a boat was excluded from use tax as a purchase for resale.
- II. Whether penalties imposed pursuant to the Notice of Determination should be sustained.

***FINDINGS OF FACT***

1. On April 24, 2000, following an audit, the Division of Taxation (“Division”) issued to petitioners, C. Wayne Clark and C. Key Chevrolet, Inc., a Notice of Determination which asserted \$12,950.00 in additional tax due, plus penalty and interest imposed pursuant to Tax Law § 1145(a)(1)(i) and (ii), for the period March 1, 1999 through May 31, 1999.

2. Petitioner C. Key Chevrolet, Inc. (“the corporation”) is an automobile dealership and an authorized franchise of Chevrolet cars, sport-utility vehicles, and light trucks. It is located in Keeseville, New York, in the Adirondack Park, approximately 15 miles south of Plattsburgh, New York and approximately one mile from Lake Champlain. C. Key Chevrolet sells 400 to 500 new and used cars and light trucks per year. The corporation has “a couple” of vehicles which have been in its inventory since May 1999 and which remained unsold as of November 2001.

3. Keeseville, New York is a resort community which attracts tourists because of its close proximity to Lake Champlain. Many boats are purchased and sold in the area.

4. Petitioner C. Wayne Clark is the president and sole shareholder of C. Key Chevrolet, Inc. Mr. Clark has been an automobile dealer for 38 years. He is responsible for all tax compliance matters involving the corporation. Mr. Clark resides in Peru, New York “right on the lake [Lake Champlain].”

5. C. Key Chevrolet, Inc. was incorporated in New York by Mr. Clark on January 17, 1992. Its Certificate of Incorporation lists many purposes for which the corporation was to be formed. Among such purposes, the certificate lists a general motor vehicle business, including, among many types of vehicles, motor boats. Other purposes listed in the Certificate of

Incorporation are an automobile service station business, a real estate business, and a general merchandising and trading business.

6. In May 1999, Mr. Clark traveled by plane to Indianapolis, Indiana where, on May 28, 1999, he purchased a used 1999 model 38-foot Fountain Fever boat (vehicle identification number FGQ38280G899), a boat trailer, and a 1998 Chevrolet pickup truck. At the time of purchase the boat's hour meter indicated that the engine had 28 hours of use. Mr. Clark purchased the boat, trailer, and truck from John R. Gannon.

7. In connection with this purchase, Mr. Clark completed a credit application dated May 21, 1999. The application lists Mr. Clark as the applicant and indicates that the "unit being purchased" is a used 1999 Fountain for a cash price of \$185,000.00 plus sales tax of \$12,950.00 for a total sale price of \$197,950.00. The application further indicates a cash down payment of \$32,950.00 and an amount financed of \$165,000.00.

8. Mr. Clark also completed a Security Agreement/Retail Installment Contract dated May 28, 1999, in connection with the subject purchase. Mr. Clark is listed as the customer on the application and Offshore Marine, Inc. of Topeka, Kansas is listed as the seller. This document lists a "cash price" for the vessel and a "total cash price" of \$185,000.00. This contract also has a space to list the cash price of a trailer. "N/A" has been entered in this space. The installment contract lists a total cash down payment of \$37,000.00 and taxes paid to public officials of \$12,957.00. This document further indicates a total amount financed on the purchase of \$161,542.00. At an annual percentage rate of 8.49 percent over 20 years, the installment contract calls for monthly payments of \$1,400.88 beginning in July 1999.

9. Mr. Clark had no intent to pay any sales tax in connection with the May 28, 1999 purchase of the truck, boat, and trailer, and did not pay any such tax.

10. The record also contains a Kansas Department of Revenue Division of Vehicles form “Bill of Sale” which indicates that Offshore Marine, Inc. of Topeka, Kansas sold the boat in question to Mr. Clark and “Key Chevrolet” for \$185,000.00 on May 28, 1999. The information on this form is sworn to on behalf of the seller by the notarized signature of Bob Searing dated May 28, 1999.

11. The record also contains a document captioned “Bill of Sale” which states: “I, John R. Gannon, sold the following to: Key Chevrolet.” This document lists a price of \$150,000.00 for the boat in question, \$15,000.00 for the trailer, and \$24,000.00 for the truck. This document is signed, but not sworn to, by John R. Gannon and also bears the signature of a notary public. Although it bears a typewritten date of May 28, 1999, the signature of the notary is hand-dated November 7, 2000.

12. After completing the purchase in Indiana, Mr. Clark drove the newly-purchased truck, trailer and boat back to Keeseville, New York.

13. Mr. Clark registered the boat in question with the New York State Department of Motor Vehicles (“DMV”) in the corporation’s name on July 7, 1999. DMV issued a Certificate of Title to the corporation as owner on August 16, 1999. DMV records obtained by the Division indicate that the corporation represented to DMV that the boat was purchased for rental. The corporation paid no sales or use tax to DMV at the time of registration.

14. Monthly payments of \$1,400.88 under the installment contract entered into by Mr. Clark were made by the corporation commencing in July 1999. The corporation also maintained insurance on the boat.

15. At the time the purchase at issue occurred, C. Key Chevrolet, Inc. was registered as a motor vehicle dealer with DMV and as a vendor for sales tax purposes with the Division of Taxation. The corporation was not registered with DMV as a boat dealer at that time.

16. C. Key Chevrolet, Inc. filed an application dated November 8, 1999 seeking to register as a boat dealer with the DMV. The corporation's registration as a boat dealer became effective February 15, 2000.

17. The corporation has not purchased any boats since becoming a registered dealer. Other than the boat at issue, Mr. Clark has purchased only one other boat and that boat was purchased many years ago.

18. The boat in question has been placed in winter storage each year at the Plattsburgh Boat Basin, Inc., Plattsburgh, New York, in early September and removed from storage in early May. The annual cost of such storage was \$608.00. The invoices documenting such storage refer to a May "launch" of the boat.

19. When not in storage, the boat was frequently kept at the dealership. Mr. Clark named the boat "The Dealer," which was painted in large letters over the entire 38-foot side of the boat. While he was required to put a name on the boat by U.S. Coast Guard regulations, Mr. Clark chose to put the name on the boat in this way and to display the boat at the dealership for advertising purposes. This prominent display of the boat has attracted customers to the dealership.

20. Petitioner advertised the boat for sale in the classified advertising section of the Plattsburgh Press-Republican from April 20 through April 23, 2000.

21. C. Key Chevrolet, Inc. entered into brokerage open listing agreements with Plattsburgh Boat Basin and Snug Harbor Marina, Peru, New York, in the summer of 1999. The

asking price for the boat under the brokerage agreements was \$195,000.00 with the broker entitled to a commission of 10 percent of the purchase price upon the sale of the boat. The corporation was not under any obligation to sell the boat under the brokerage agreements and could reject any offer to buy.

22. The boat in question has General Motors engines, which are the same engines as are used in the pick-up trucks sold by the corporation. The corporation carried parts for these engines in its inventory and its mechanics could service the boat's engines.

23. The pickup truck purchased on May 28, 1999 was subsequently sold by the corporation on June 22, 2000 at a selling price of \$28,990.00.

24. The boat in question remained unsold as of the date of the hearing in this matter.

25. By letter dated July 26, 1999, the Division scheduled an audit of the corporation to commence on October 18, 1999 at the corporation's place of business. The auditor was present at the dealership and did conduct an audit on October 18, 19, and 20, 1999. The auditor was also present at the business on November 8, 1999. The corporation's bookkeeper, Bob Sussey, worked with the auditor during the audit.

26. Upon review, the auditor determined that the corporation's books were adequate and therefore conducted a detailed method of audit. Following his review of the corporate books, the auditor accepted the corporation's taxable sales as reported. The audit did reveal a deficiency of approximately \$12,000.00 arising from the use of demonstrator vehicles and other matters connected to the sale and lease of motor vehicles. This deficiency was agreed to and paid by the corporation.

27. As part of the audit the auditor accessed certain DMV records for vehicles registered in the corporation's name. In his review of such records, the auditor became aware that the boat

in question was registered to the corporation on July 7, 1999. After discussions with Mr. Sussey and upon review of certain documents connected with the sale, the auditor concluded that the purchase of the boat was properly subject to use tax. The auditor assessed tax upon the \$185,000.00 sale price as indicated by the Security Agreement/Retail Sales Contract and the credit application (*see*, Findings of Fact “7” and “8”) and thus calculated the additional tax due as set forth in the subject Notice of Determination.

28. The auditor determined that the corporation’s sales tax returns were timely filed and tax reported due thereon paid. In addition, the auditor found that all withholding tax returns were timely filed and withholding tax paid. The auditor also determined that the corporation was in compliance with the omnibus laws and did not impose omnibus penalty.

29. The corporation has not filed a New York State franchise tax return since tax year 1993 and has requested extensions for filing New York State franchise tax returns for all years subsequent to 1993. Mr. Clark has not filed a New York State personal income tax return since 1995 and has requested extensions for filing New York State personal income tax returns for all years subsequent to tax year 1995.

30. R. Scott Boushie is the certified public accountant for Mr. Clark and the corporation responsible for the preparation of Mr. Clark’s personal income tax returns and the corporation’s franchise tax returns. According to Mr. Boushie, any failure to timely file such returns is predominantly attributable to delays at the accounting firm.

31. The present controversy is the first time petitioners have ever had a sales tax issue arise with the Division of Taxation.

32. DMV requires the registration of boat dealers when three or more boats are sold during the course of a year. DMV does not require such registration if no more than two boats are sold during the course of a year.

33. At hearing, the auditor testified that petitioners did not have to be registered as a boat dealer in order to qualify for the resale exclusion.

34. Petitioner submitted proposed findings of fact numbered “1” through “32.” Proposed findings of fact “1” through “19” and “22” through “32” are accepted and have been, in substance, incorporated herein. The evidence in the record to support proposed findings of fact “20” and “21” consists of the uncorroborated testimony of Mr. Clark. I did not find Mr. Clark’s testimony to be sufficiently credible to accept such proposed findings as facts herein.

### ***CONCLUSIONS OF LAW***

A. Tax Law §1110(a) imposes a compensating use tax on the use in New York of tangible personal property purchased at retail by a New York resident outside of the State (*see also*, 20 NYCRR 525.2[b][1][i]). “Retail sale” as used in Article 28 of the Tax Law is defined, in relevant part, as “[a] sale of tangible personal property to any person for any purpose, other than (A) for resale as such” (Tax Law 1101[b][4][i]).

B. Petitioners claim that the boat in question was purchased for resale and therefore not subject to use tax. In order to establish entitlement to the resale exclusion and thereby avoid use tax, petitioners must show that the boat was “purchased for one and only one purpose: resale” (*Matter of Savemart, Inc. v. State Tax Commn. of State of N.Y.*, 105 AD2d 1001, 482 NYS2d 150, 152, *appeal dismissed* 64 NY2d 1039, 489 NYS2d 1029, *lv denied* 65 NY2d 604, 493 NYS2d 1025). Since the use tax, like its Article 28 counterpart, the sales tax, is a transaction tax, it is petitioners’ intent at the time of purchase of the boat that determines whether the resale

exclusion applies (*see, Datascope v. Tax Appeals Tribunal*, 196 AD2d 35, 608 NYS2d 562, 564). Later events may be relevant to determine that intent at the time of purchase (*see, D.J.H. Construction v. Chu*, 145 AD2d 716, 535 NYS2d 249, 251).

C. Petitioners' case depends to a significant degree upon the uncorroborated testimony of Mr. Clark. The record, however, reveals several inconsistencies between such testimony and the documentary evidence. Mr. Clark's testimony thus lacks credibility. Accordingly, petitioners have failed to establish that Mr. Clark's intent at the time of purchase of the boat was exclusively for the purpose of resale. The boat was thus properly subject to use tax.

Mr. Clark testified that when he bought the boat his intent was to resell it. Contrary to this testimony, the credit application and the Security Agreement/Retail Installment Contract, both signed by Mr. Clark around the time of purchase, show that sales tax was to be paid on the transaction and thus indicated to the finance company a retail sale. Given his many years as a car dealer, Mr. Clark had to be aware that by documenting that sales tax was payable on the transaction, he was indicating a retail sale and not a purchase for resale. Indeed, the contract signed by Mr. Clark at the time of purchase was a *retail* installment contract.

That Mr. Clark had no intention of paying sales tax on the purchase when he completed the credit application and the Security Agreement/Retail Installment Contract, and thereby intentionally provided false information on those documents, serves to further undermine the credibility of his testimony.<sup>1</sup> At the least, such conduct shows a lack of concern regarding truthfulness and accuracy. Moreover, Mr. Clark's weak explanation for his deception does not

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<sup>1</sup> Regarding Mr. Clark's uncorroborated testimony that he intended to resell the boat and never used it for personal purposes, it is noteworthy that, while the boat had a meter which recorded hours of use, petitioners offered no evidence of the hour meter's reading as of the date of the hearing. The boat's hour meter indicated 28 hours of use at the time of sale. If the boat had been used as little as petitioner claimed, the hour meter could have provided corroboration.

restore his credibility. Specifically, petitioners asserted that sales tax was added to the total purchase price on the credit application and the retail installment contract as part of a “creative” financing scheme designed to inflate the total purchase price in order to justify a financing greater than or equal to the purchase price. This explanation, however, appears inconsistent with the facts. According to petitioners, the total price for the boat and trailer was \$165,000.00 and the total price for the boat, trailer and truck was \$189,000.00 (*see*, Finding of Fact “11”). The installment contract shows that the amount financed was approximately \$162,000.00. There was thus no apparent “over-financing” and therefore no need to overstate the total price as petitioners claim.

Mr. Clark’s registration of the boat with DMV further undermines the credibility of his testimony that the boat was purchased for resale. Tax Law § 1132(f) prohibits the commissioner of motor vehicles from registering a boat or other motor vehicle except upon proof that sales or use tax has been paid or that no such tax is due. The evidence in the record indicates that Mr. Clark avoided payment of tax upon registration by indicating to DMV that the boat was to be used for rental to customers (*see*, Finding of Fact “13”).

The corporation’s use of the boat for advertising (*see*, Finding of Fact “19”) also supports a finding against petitioners. While he may have been required by U.S. Coast Guard regulations to put a name on the boat, Mr. Clark’s decision to paint the name “The Dealer” in large letters over the entire 38-foot side of the boat and to prominently display the boat at the dealership shows an intent to use the boat for a purpose other than resale, e.g., advertising, and thereby supports a finding that the boat was subject to tax (*see, Matter of P-H Fine Arts, Ltd. v. Tax Appeals Tribunal*, 227 AD2d 683, 642 NYS2d 232, 234, *lv denied* 89 NY2d 804, 653 NYS2d

543). As noted, to qualify for the resale exclusion petitioners had to show that the boat was purchased *exclusively* for retail.

While the brokerage agreements and the newspaper advertisements do indicate some effort by petitioners to sell the boat, given the questions regarding the credibility of Mr. Clark's testimony as discussed, this evidence is insufficient to establish that Mr. Clark purchased the boat exclusively for resale. In addition, the significance of the newspaper advertisements is diminished by the fact that such ads were placed only after the Division claimed, during the audit, that the boat was taxable. Furthermore, ads were placed in the newspaper for less than a week in April 2000 while the boat remained unsold as of the date of the hearing, nearly two and one-half years after its purchase. Also, the weight to be accorded the brokerage agreements is diminished by a lack of evidence in the record of any real effort made by the brokers to sell the boat. Indeed, there is no evidence of a single prospective buyer coming through the brokers. Further, the brokerage agreements imposed no obligation on the corporation to sell the boat even if the broker found a buyer willing to pay the asking price.

Additionally, the corporation's registration as a boat dealer lends little support to petitioners' position herein.<sup>2</sup> The corporation registered as a boat dealer after the audit began and after petitioners became aware that the taxable status of the boat was in question. The corporation did not purchase any other boats and apparently did not make any other efforts toward entering the boat business after its registration as a dealer. The corporation's registration thus appears to have been more an effort to avoid the imposition of use tax on the boat in question than an entry into a new line of business.

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<sup>2</sup> As correctly noted in the briefs of both petitioners and the Division, and contrary to the affirmative statement contained in the Division's answer, it was not necessary for the dealership to be registered as a boat dealer to qualify for the resale exclusion on its purchase of the boat.

Finally, the corporation's certificate of incorporation, which included the sale of motor boats among many purposes for which the corporation was formed, also provides little support to petitioners' position. As discussed, the corporation apparently made little effort to become a boat dealer. Moreover, the certificate of incorporation was filed approximately seven years before the sale at issue; the sale of motor boats was one among a list of many purposes for which the corporation was to be formed; and the corporation did not engage in many of the kinds of business authorized and listed in the certificate.

D. Tax Law § 1145(a)(1)(i) states that any person failing to file or pay over any sales or use tax to the Commissioner of Taxation and Finance ("the Commissioner") "shall" be subject to a penalty. This penalty may be canceled if the Commissioner determines that the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Commissioner's regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]). "By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner's discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]" (*Matter of MCI Telecommunications, Corp.*, Tax Appeals Tribunal, January 16, 1992). The taxpayer faces the "onerous task" of establishing reasonable cause as well as the absence of willful neglect (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993).

E. Petitioners have failed to establish reasonable cause or an absence of willful neglect in this matter. In support of a finding of reasonable cause petitioners note the corporation's good record of timely filing and paying its sales tax returns. This point is offset, however, by the

corporation's and Mr. Clark's less-than-stellar record in filing their respective corporate franchise and personal income tax returns (*see*, 20 NYCRR 2392.1[b][“In determining whether reasonable cause exists, . . . the taxpayer's previous compliance record with respect to all of the taxes imposed pursuant to the Tax Law may be taken into account.”]). Additionally, the corporation's representation to DMV at the time of registration that the boat was purchased for rental (thereby avoiding the payment of tax) shows willful neglect and thus supports the imposition of penalty. Willful neglect is also shown in Mr. Clark's intentional provision of false information on the credit application and the Security Agreement/Retail Installment Contract. Such conduct indicates an indifference to the proper sales and use tax treatment of the transaction at issue. Accordingly, the imposition of penalty is sustained.

F. The petition of C. Wayne Clark and C. Key Chevrolet, Inc. is denied and the Notice of Determination dated April 24, 2000 is sustained.

DATED: Troy, New York  
September 26, 2002

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE